Supreme Court, U.S.
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Case Number:

IN THE

Supreme Court of the United States

GARY LEFKOWITZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petition for Writ Of Certiorari

Gary Lefkowitz

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Petitioner in Pro Se

980P

QUESTIONS PRESENTED

I

IS JUROR "UNANIMITY" REQUIRED AS TO THE "SERIES OF VIOLATIONS" NECESSARY TO PROVE A VIOLATION OF 18 U.S.C. 225, THE FINANCIAL KINGPIN LAW.

II

CAN CAUTIONARY LANGUAGE IN BUSINESS DOCUMENTS "BESPEAK CAUTION" SUCH THAT THE "MATERIALITY" REQUIRED BY NEDER V. U.S. IS NEGATED?

III

IS THE GOVERNMENT REQUIRED TO PROVE AN "AGREEMENT" TO VIOLATE THE LAWS IN ORDER TO PROVE THE "ACTING IN CONCERT" ELEMENT OF 18 U.S.C. 225?

IV

IS AN APPEAL FROM AN AMENDED JUDGMENT A "CRITICAL STAGE" THAT TRIGGERS THE 6th AMENDMENT RIGHT TO COUNSEL?

LIST OF PARTIES

Petitioner

Petitioner Gary Lefkowitz, 1299 Seaside Avenue, Box 3007 06548-041, San Pedro, California, 90731-0207

Respondent

The United States represented by Seth Waxman, U.S. Solicitor General, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC., 20530-0001

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RELEVANT STATUTE CITED

18 U.S.C. 225 CONTINUING FINANCIAL CRIMES ENTERPRISE (CFCE)

"(a) Whoever -

(1) organizes, manages, or supervises a continuing financial crimes enterprise; and

(2) receives $5,000,000 or more in gross receipts from such enterprise during any 24 month period, shall be ... imprisoned for a term of not less than 10 years and which may be life.

(b) For purposes of subsection (a), the term "continuing financial crimes enterprise" means a series of violations under section 215, 656, 657, 1005, 1007, 1014, 1032, or 1344 of this title, or section 1341 or 1343 affecting a financial institution, committed by at least 4 persons acting in concert."

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be deprived of Life, Liberty, or Property; without due process of law..." (Fifth Amendment)

"In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense" (Sixth Amendment)

PETITION

The Petitioner, GARY LEFKOWITZ, In Pro Se, respectfully prays that a Writ of Certiorari issue, or to Grant, Vacate, and Remand ("GVR") this matter to the Eighth Circuit Court of Appeals for consideration in light of three (3) recent Supreme Court Cases: ***Richardson v. U.S.***, 119 S.Ct. 1707 (1999) (Unanimity"), ***Neder v. U.S.***, 119 S.Ct. 1827 (1999) (Materiality"), and ***Rutledge v. U.S.***, 517 U.S. 292 (1996) ("Acting In Concert").

In addition, Certiorari is requested to determine whether an Appeal from an Amended Judgment is a "Critical Stage" requiring the appointment of counsel under the **Sixth Amendment.**

OPINIONS BELOW

The Opinions below are found at *U.S. v. Lefkowitz*, 125 F.3d 608 (8th Cir. 1997) (Lefkowitz I) (Appendix "A", page 1). The decision of the Eighth Circuit on Appeal from the Amended Judgment is found in an Unpublished Summary Disposition dated August 9, 1999 (Lefkowitz II at Appendix "B", page 26).

JURISDICTION

The Jurisdiction of this Court is invoked under the provisions of *28 U.S.C. 1254(1)*. This petition is timely filed pursuant to filing deadlines set by the clerk, in compliance with Rule 14.5.

STATEMENT OF THE CASE

A. BACKGROUND

This case concerns my Indictment in 1994 and relates to activities associated with my ownership of a company (CEG) that was one of the largest developers, syndicators and operators of multi-family residential apartments in the United States, with buildings located in 20 states. The apartments were developed using the benefits of the Low Income Housing Tax Credit Program under *26 U.S.C. 42*.

Many of the issues relate to a cataclysmic Banking and Savings and Loan Crisis (The "Banking Crisis") that occurred in the United States in the late 1980's and early 1990's. This Banking Crisis was discussed by this Court in *U.S. v. Winstar*, 518 U.S. 839 (1998).

B. COUNTS OF CONVICTION

On July 21, 1995 I was found guilty of all 47 Counts of the indictment by a jury sitting in Minneapolis, Minnesota. The trial lasted some seven (7) weeks and involved over 190,000 documents.

Counts 1-16 were for violating *18 U.S.C. 1341* (Mail Fraud). Counts 17-30 were for violating *18 U.S.C. 1343* (Wire Fraud). Count 31 was for violating *18 U.S.C. 2314* (Travel Fraud). Counts 32-41 were for violating *18 U.S.C. 7206(2)* (Tax Fraud). Counts 42 and 43 were for violating *18 U.S.C. 1001* (False Statements). Count 44 was for violating *18 U.S.C. 1503* (Obstructing Justice). Count 45 was for violating *26 U.S.C. 7212(a)* (Obstruction of Internal Revenue

Laws). Count 46 was for violating *18 U.S.C. 152* (False Statements in a Bankruptcy Proceeding). Count 47 was for violating *18 U.S.C. 225* (Continuing Financial Crimes Enterprise, hereinafter "CFCE" or "Financial Kingpin Law").

Although found guilty of Counts 31 and 45, these Counts were dismissed by the Government prior to sentencing. The Honorable David S. Doty, United States District Court Judge for the District of Minnesota, sentenced me to 293 months in prison on the CFCE Count and concurrent 3 and 5 year sentences on the remaining Counts of conviction. This is one of the longest "White Collar" criminal sentences ever imposed under the U.S. Sentencing Guidelines. I am a first time offender.

C. APPEAL FROM ORIGINAL JUDGMENT, (LEFKOWITZ I)

On Appeal from the Original Judgment, the Eighth Circuit Court of Appeals affirmed all but two Counts in a published decision filed on September 9, 1997 (Lefkowitz I, Appendix "A", page 1). The decision in Lefkowitz I reversed Counts 1 and 30 and remanded the entire case to the District Court for the entry of an amended judgement and for consideration as to whether re-sentencing was necessary. A Petition for Rehearing was denied on October 15, 1997.

D. AMENDED JUDGMENT

On October 30, 1997, an Amended Judgment was entered in the District Court sentencing me to the same 293 months on the CFCE Count as well as the same 3 and 5 year concurrent sentences on the unvacated Counts of conviction.

E. APPEAL FROM AMENDED JUDGMENT, (LEFKOWITZ II)

On appeal from the Amended Judgment, the Eighth Circuit Court of Appeals (without stating its reasons) Affirmed the Amended Judgment in all respects in an Unpublished "Summary Disposition" on August 9, 1999 (Lefkowitz II, Appendix "B", page 26).

F. RECENT U.S. SUPREME COURT CASES NOT CONSIDERED

After the trial and sentencing in 1995, this Court issued its opinions in the following cases:

Richardson v. U.S., 119 S.Ct. 1707 (1999), holding that there must be juror "Unanimity" as to the "Series of Violations" necessary under *21 U.S.C. 848* (Continuing Crimes Enterprise -CCE).

Neder v. U.S., 119 S.Ct. 1827 (1999), holding that "Materiality" is an element that must be proven in Mail Fraud, Wire Fraud, and Tax Fraud cases.

Rutledge v. U.S., 517 U.S. 292 (1996), holding that the term "Acting in Concert" requires proof of "Mutual Agreement" to commit a crime.

I am entitled to the benefits of the law prevailing at the time of my appeal, *Griffith v. Kentucky*, 479 U.S. 314 (1987). My case was still on appeal at the time that this Court decided Richardson, Neder, and Rutledge. I am therefore entitled to the benefits of these three new cases.

The Summary Disposition in Lefkowitz II by the Eighth Circuit does not reference Richardson, Neder, or Rutledge.

REASONS FOR GRANTING CERTIORARI OR A GVR ORDER

As will be shown herein, the Eighth Circuit's Summary Disposition was issued in this case without taking into consideration the impact of the three (3) recent Supreme Court cases discussed above: Richardson, Neder, and Rutledge. If the Eighth Circuit had applied these new cases it is likely that the Eighth Circuit would have reversed the Amended Judgment. As a result of not considering these new cases, it is likely that I am serving a 24 ½ year prison sentence (and shorter concurrent sentences) for conduct that is not illegal, all in violation of the Due Process Clause of the Fifth Amendment.

A Grant of Certiorari or a GVR Order would determine whether Richardson's requirement of "Unanimity" applies to prosecutions under *18 U.S.C. 225* (Continuing Financial Crimes Enterprise-the Financial Kingpin Law).

A Grant of Certiorari or a GVR Order would determine whether cautionary language in business documents can "bespeak caution" in criminal cases such that the "Materiality" of a misrepresentation or omission (as required by Neder) is negated as a matter of law.

A Grant of Certiorari or a GVR Order would determine whether Rutledge's requirement of proof of an "Agreement" as an element of "Acting In Concert" applies to

prosecutions under *18 U.S.C. 225*, and whether the "Acting In Concert" element is proven by "management" of others without proof of an "Agreement" to violate the laws.

Finally, I was left totally without counsel on Appeal from the Amended Judgment in this case. A Grant of Certiorari would resolve the issue as to whether an Appeal from an Amended Judgment is a "Critical Stage" that requires the appointment of counsel pursuant to the provisions of the Sixth Amendment.

A. CERTIORARI OR A GVR ORDER IS APPROPRIATE IN LIGHT OF RICHARDSON

On June 1, 1999 this Court issued its opinion in *Richardson v. U.S.*, 119 S.Ct. 1707. Richardson holds that a conviction for engaging in a Continuing Criminal Enterprise (CCE) requires "Unanimous" agreement among the jurors as to the specific "Violations" comprising the "Continuing Series". Richardson dealt with a CCE under *21 U.S.C. 848* (the Drug Kingpin Law). My case deals with a CFCE under *18 U.S.C. 225* (Continuing Financial Crimes Enterprise "CFCE", commonly referred to as the Financial Kingpin Law). Both *21 U.S.C. 848* and *18 U.S.C. 225* use the term "Series of Violations". In Richardson this Court focused on the term "Series of Violations" and held that it is a separate "element" that must be proven and which requires:

". . . jury unanimity in respect to each violation."

The jury in my case was never instructed that it was required to be "Unanimous" as to the violations comprising a continuing "Series of Violations" under *18 U.S.C. 225*

1. REVERSAL OF COUNTS 1 AND 30 BY THE EIGHTH CIRCUIT DESTROYED ANY UNANIMITY

The Eighth Circuit Court of Appeals reversed two "Violations" (Counts 1 and 30) in Lefkowitz I, 125 F.3d 608, 618 (Appendix "A", page 1). When Counts 1 and 30 were reversed and vacated on appeal these Counts became "legally inadequate" predicate acts since they were no longer "Violations" of the law. These "legally inadequate" Counts could not be used by the jury to find a "Series of Violations" as required by the CFCE statute *(18 U.S.C. 225)*. Because the jury returned a General Verdict, this Court can have no confidence that the reversal of Counts 1 and 30 did not destroy any juror Unanimity as to a "Series of Violations".

2. GOVERNMENT ADMITS COUNT 30 WAS USED BY THE JURY

The Government admits in its brief in Lefkowitz II that Count 30 was used by the jury to find guilt under the CFCE count (Appendix "C", page 29). However, the jury was never instructed not to use either Count 1 or any other count in consideration of the CFCE Count. On the record it is impossible to tell which Counts were chosen by the jury to support the CFCE conviction, or whether the jurors were unanimous as to the Counts comprising a "Series of Violations".

3. EIGHTH CIRCUIT DID NOT CONSIDER EFFECT OF REVERSING COUNTS 1 AND 30

When the Eighth Circuit Reversed Counts 1 and 30 it did not discuss whether the Vacating of these Counts could have destroyed the Unanimity as to the "Series of Violations" required by *18 U.S.C. 225*, (See Appendix "A", page 15, 17

4. REMAINING COUNTS DO NOT COMPRISE A "SERIES"

The Eighth Circuit did not discuss whether the jurors were "Unanimous" as to a "Series" of "Unvacated Violations". Although Mail and Wire Fraud Counts were Affirmed, not all of these Counts could have been used for purposes of the CFCE Conviction since they did not all affect a Financial Institution (as defined in *18 U.S.C. 20)*. Nor did the unvacated Counts meet the other requirements of *18 U.S.C. 225*, i.e. 4 or more people "Acting in Concert" with respect to an Unvacated "Series of Violations" and $5,000,000 received from the "Series of Violations" affecting a Financial Institution.

5. UNVACATED COUNTS DO NOT MEET THE REQUIREMENTS OF *18 U.S.C. 225*

Of the 30 Mail and Wire Fraud Counts set forth in the indictment, the Government argued in Lefkowitz II that only 30% (9) of them could have been used by the jury to find guilt on the CFCE Count (Appendix "C", page 29). However, the jury was never instructed not to consider the

other 70% (21) of the Mail / Wire Fraud Counts. Of the 9 Counts asserted by the Government, only 4 could have been legally used by the jury. This is because: 1) Count 30 has been vacated, 2) the Government admitted in its Lefkowitz II brief that the bank referenced in Counts 9 & 29 was not a "Financial Institution" as required by 18 U.S.C. 225 since it was not Federally insured as required by 18 U.S.C. 20 (Appendix "C", page 29), and 3) Counts 26 & 28 could not be used since a securities broker is not a Financial Institution as required by 18 U.S.C. 20.

This left only 13.33% of the Mail / Wire Fraud Counts (4/30) for the jury to reach a unanimous agreement upon 3 counts that comprised a "Series of Violations". The jury was never instructed not to consider the other 26 counts. This court can have no confidence that the 26 Legally Impermissible counts which comprised 86.66% of the Mail and Wire Fraud Counts were not used by the jury to find guilt under the CFCE. Absent a unanimity instruction, there is an 86.66 probability that the jury dove into the tainted well of legally impermissible counts. Clearly, this is not harmless error.

Of the 4 Legally Permissible Counts, they all affected Financial Institutions in one program known as FSM VI. The Eighth Circuit had to rely upon a program known as FSM VIII in addition to FSM VI, to arrive at the $5,000,000 threshold required by 18 U.S.C. 225 (Appendix "A", page 16). The Eighth Circuit Stated:

"... Banks invested a total of $1,120,000 in FSM VI and FSM VIII. Those offerings together grossed over $5,000,000".

With Counts 9 & 29 out of the mix, the FSM VIII dollar amounts could not be used to meet the $5,000,000 jurisdictional requirement of 18 U.S.C. 225, since they did not affect a "Financial Institution". When the amounts attributable to FSM VI alone are added up, they do not meet the $5,000,000 threshold of 18 U.S.C. 225. The elements of the crime were not proven.

Due to the reversal of Counts 1 and 30, the government's admission as to counts 9 and 29, and the failure of Counts 26 and 28 to affect a Financial Institution, the CFCE Conviction must be reversed. In light of Richardson, there remain no legally permissible counts upon which the jury could have unanimously agreed, and which meet the statutory requirements of 18 U.S.C. 225. Therefore, the error here is not harmless.

6. NO UNANIMITY AS TO ANY UNVACATED "SERIES OF VIOLATIONS"

From the record, it is impossible to tell whether the jurors were "Unanimous" as to any "Series of Violations" that meet the requirements of *18 U.S.C. 225*. The Eighth Circuit Affirmed the Amended Judgment in Lefkowitz II without indicating whether it considered the "Unanimity" ruling in Richardson. The Eighth Circuit's opinion does not discuss whether the unvacated counts supported the CFCE conviction. By reversing counts 1 and 30 and not remanding for consideration of this issue, I was never given an opportunity to argue that the vacating of counts 1 and 30 destroyed unanimity or whether it otherwise destroyed the CFCE conviction. There is nothing in the Opinions in Lefkowitz I or II to indicate whether the Eighth Circuit ever

conducted the "Harmless Error" analysis mandated by Richardson. It is likely that the Eighth Circuit would Reverse the conviction if a GVR Order was entered, since "Unanimity" cannot be presumed in light of Richardson.

7. JURY PERMITTED TO CONSIDER "LEGALLY IMPERMISSIBLE" THEORY

By permitting the jury to find guilt under *18 U.S.C. 225*, without requiring the jurors to be "Unanimous" as to the same three (3) unvacated "Violations" comprising a "Series", allowed the jury to convict by using a "legally impermissible" theory. This Court has held that a conviction must be reversed when the jury is permitted to convict using a "legally impermissible" theory and where it cannot be determined whether the conviction is supported by a "legally permissible" theory or a "legally impermissible theory", *Yates v. U.S.*, 354 U.S. 298 (1957), *Griffin v. U.S.*, 502 U.S. 46, 59 (1991). The jury returned a "General Verdict". This Court can have no confidence that the jury did not convict by using a "legally impermissible" theory, i.e. a non "Unanimous" verdict as to the "Series of Violations" or a verdict that used either a Reversed Count or a count not affecting a Financial Institution as one of the predicate "Violations" to find a "Series".

The Second Circuit and the Ninth Circuit are in conflict with the Eighth Circuit, since both circuits have held that when we are unable to determine whether a conviction rested on a legally insufficient theory, the conviction must be vacated, *U.S. v. Vasquez*, 85 F.3d 59, 61 (2nd Cir. 1999), *U.S. V. Frega*, 179 F.3d 793, 810 (9th Cir. 1999).

8. CERTIORARI PETITION IN LEFKOWITZ I

The Certiorari Petition in Lefkowitz I (March of 1998) in Supreme Court Case No. 97-7511, argued that the Reversal and Vacating of Counts 1 and 30 on Appeal destroyed any "Unanimity" of the jury as to the "Violations" comprising any "Series". The brief argued that Counts 1 and 30 could have been the offenses that the jurors chose as two of the three underlying "Violations" necessary to find a "Series of Violations" under *18 U.S.C. 225*.

Certiorari was Denied on my Certiorari Petition to this Court in Lefkowitz I, (Case No. 97-7511, April 20, 1998), *Gary Lefkowitz v. U.S.*, 118 S. Ct. 1527, (1998). Some 1100 cases later, this Court Granted Certiorari in *Richardson v. U.S.*, Case No. 97-8629, to decide whether the jury must be "unanimous" as to the series of "violations" necessary to prove a "continuing criminal enterprise" under *21 U.S.C. 848*. This Court, therefore, denied my Certiorari Petition in Case No. 97-7511 without the benefit of Richardson.

9. SUFFICIENT EXCEPTIONAL CIRCUMSTANCES FOR CERTIORARI OR GVR

This case presents sufficient exceptional circumstances to justify the issuance of a Writ of Certiorari or a GVR Order. In these unusual circumstances where I raised this issue as to "Unanimity" on the Unvacated Counts of conviction before this Court in Case No. 97-7511, some 1100 case numbers prior to Richardson, but during the same

1997 Session, the Granting of Certiorari or the issuance of a GVR Order would be an appropriate exercise of this Court's discretionary authority due to the fact that Richardson casts substantial doubt as to the correctness of the Eighth Circuit's Summary Disposition.

B. CERTIORARI OR A GVR IS APPROPRIATE IN LIGHT OF NEDER

On June 10, 1999, this Court decided *Neder v. U.S.*, 119 S.Ct. 1827 (1999). Neder holds that "Materiality" is an element of Mail Fraud *(18 U.S.C. 1341)*, Wire Fraud *(18 U.S.C. 1343)*, and Tax Fraud *(26 U.S.C. 7206(1))*.

Counts 1 through 30 in my case are for Mail and Wire Fraud. Counts 32 through 41 are for Tax Fraud under *26 U.S.C. 7206(2)*. It is only Mail Fraud or Wire Fraud Counts that "Affect" a "Financial Institution" which can be used by a jury to find a "Series of Violations" under the Financial Kingpin Law, since offenses under *26 U.S.C. 7206* are not listed in *18 U.S.C. 225* as predicate "Violations" by Congress.

1. NO INSTRUCTION ON "MATERIALITY"

At the time that the jury was instructed, the trial judge did not list "Materiality" as a separate element of mail fraud, wire fraud, or tax fraud (Appendix "D", page 33), although a "Materiality" instruction was requested.

In contrast, the Trial Judge does list "Materiality" as a separate element of the False Document Counts in my case (Appendix "D", page 35). Since "Materiality" is not listed as

a separate element of the Mail/Wire/Tax Fraud Counts, and since it is listed as a separate element of the False Document Counts, it is reasonable to assume that the jury did not believe that "Materiality" was an element of the Mail/Wire/Tax Fraud Counts.

2. "LEGALLY IMPERMISSIBLE" THEORY REQUIRES REVERSAL

There can be no assurance that the jurors found "Materiality" absent an instruction that "Materiality" was a separate element that must be proven by the Government. Jurors are deemed to have followed their instructions, *Richardson v. Marsh*, 481 U.S. at 206 (1987). A Court's non-instruction as to an essential element is reversible error, *U.S. v. Gaudin*, 515 U.S. 516 (1995). Since the jury was permitted to convict under the Mail/Wire/Tax Fraud Counts without being required to find "Materiality" as a separate element, it was permitted to find guilt using a "legally impermissible" theory, thereby requiring reversal under *Yates v. U.S.*, supra and *Griffin v. U.S.*, supra. When there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside, *Leary v.* U.S. 395 U.S., 31 - 32 (1969)

In Lefkowitz I, the Eighth Circuit made no finding that "Materiality" was proven with respect to the Mail or Wire Fraud Counts. The Eighth Circuit listed the elements of Mail and Wire Fraud and did not list "Materiality" as an element that must be proven (Appendix "A", page 8). The Eighth Circuit did not address the failure to instruct the jury as to "Materiality", nor did it discuss whether this error was

"Harmless". This Court's decision in Neder mandates such an analysis which is absent from the Opinions of the Eighth Circuit (Appendix "A", page 1 & Appendix "B", page 26).

3. MATERIALITY NEGATED AS A MATTER OF LAW BY "BESPEAKS CAUTION DOCTRINE".

Without a "Materiality" instruction I could not argue that any alleged misstatement or omission was "Non-Material" or that there was sufficient cautionary language contained in the Securities Private Placement Memorandums ("PPM'S") to "Bespeak Caution" and thereby negate the "Materiality" of any alleged misstatement or omission.

In a Civil context this Court has held that the "Materiality" of even misleading statements recede in the face of truthful cautionary language, *Virginia Bankshares v. Sandberg*, 501 U. S. 1083 (1991). In a securities context, this Court has held that if a misrepresentation of fact is not "Material'" then the misrepresentation is not actionable, *Basic v. Levinson*, 485 U.S. 224, 238 (1988).

This case presents the question as to whether cautionary language in business documents can "Bespeak Caution" in a Criminal Case such that the "Materiality" of a misrepresentation or omission is negated as a matter of law. The "Bespeaks Caution Doctrine" represents the unremarkable proposition that statements must be analyzed in context, *Rubenstein v. Collins*, 20 F.3d 160, 167 (5th Cir. 1994). Nearly every Circuit has adopted the "Bespeaks Caution Doctrine" as an absolute defense in suits brought in contract, tort, or civil securities fraud theories. It is intolerable that a business person can defend their money,

property and business with a "Bespeaks Caution" defense, by disclosing the "Material" risks, but cannot protect his or her liberty by disclosing such risks.

The Seventh Circuit, in *U.S. v. Morris*, 80 F.3d 1151, 1167 (7th Cir. 1996), acknowledged that the "Bespeaks Caution Doctrine" may serve as a defense in a criminal trial to negate the "Materiality" of a misleading statement as a matter of law. In Lefkowitz I, I argued that the PPM'S (Securities Offerings) "Bespoke Caution" by disclosing the "Material" risks. The Eighth Circuit acknowledged the cautionary language when it stated:

"... Lefkowitz denies this was fraudulent, pointing to Article IX of the PPM'S which... permitted CEG to lend money on behalf of the partnership to others, including the General Partners and their affiliates". (Appendix "A", page 5).

The Eighth Circuit rejected the "Bespeaks Caution Doctrine" as a defense to the Mail and Wire Fraud counts, prior to Neder by stating at Appendix. "A", page 12:

> **"We disagree... the language of the PPM'S notwithstanding."**

A Government immunized attorney witness who had written the PPM'S, testified that the language regarding the lending of money was not illegal and was not limited to short term loans (Appendix "E" page 37). A Government immunized C.P.A. stated that he believed until 1994 that CEG could borrow from the partnerships and from the FSM's, (Appendix "F", page 39). Two securities brokers testified for

the government that Section 9.02 disclosed an ability to lend funds to CEG (Appendix "G", page 41), (Appendix" H", page 43). This is powerful evidence that the documents did "Bespeak Caution".

Certiorari a GVR Order is appropriate to resolve this split in the circuits, and to determine whether cautionary language in a business document can "Bespeak Caution" to negate the "Materiality" of an alleged misstatement or omission.

4. NEDER GRANTED CERTIORARI 6 MONTHS AFTER I RAISED "MATERIALITY" BEFORE THIS COURT

On April 8, 1998, in Case No. 97-7511, I sent this Court a Citation to Supplemental Authority (filed April 9, 1998) which references *U.S. v. Neder*, (then an 11th Circuit case) and discussed the conflicts among the circuits as to whether "Materiality" was or was not an element of Mail/Wire/Tax Fraud. My Petition for a Writ of Certiorari on Case No. 97-7511 was denied on April 20, 1998, 118 S.Ct. 1527. However, Certiorari was Granted during the same session in Neder, approximately six (6) months later (October 13, 1998), in Case No. 97-1985 on the identical issue as to "Materiality".

5. LIKELY EIGHTH CIRCUIT WOULD REVERSE IN LIGHT OF NEDER.

It is likely that the Eighth Circuit would Reverse the Mail/Wire/Fraud Counts and the Financial Kingpin Count (*18 U.S.C. 225*), if this case was Remanded for consideration

in light of Neder. "Materiality" was not proven. In light of the "Bespeak Caution Doctrine" the failure to instruct was not "Harmless".

C. CERTIORARI OR A GVR ORDER IS APPROPRIATE IN LIGHT OF RUTLEDGE

In March of 1996, this Court issued its Opinion in *Rutledge v.* U.S. 517 U.S. 292 (1996). Rutledge established that the elements of "Conspiracy" (mutual agreement, knowledge and intent) must be proven by the Government in order to prove the "Acting in Concert" element of a Continuing Criminal Enterprise under *21 U.S.C. 848*.

Both the CCE statute *(21 U.S.C. 848)* and the CFCE statute *(18 U.S.C. 225)* require proof of the element that 4 people "Acted in Concert" with respect to a "Series of Violations".

1. JURY IMPROPERLY INSTRUCTED ON "AIDING AND ABETTING"

In preliminary instructions on June 7, 1995, regarding the CFCE count, the Judge told the jury that it must find that I was "Aided and Abetted" by three (3) or more persons, (Appendix "I", page 45). However, the language of Congress in *18 U.S.C. 225* is "Acting in Concert", not "Aided and Abetted". Congress is a body of lawyers who are deemed to know both the English language and the legal significance of the words it chooses, *Taylor v. U.S.*, 495 U.S. 575 (1990). When Congress assigns criminal culpability to only one type of participant in a transaction, it intends to leave others not included, *Gebardi v. U.S.*, 287 U.S. 112 (1932). The

language of a statute must be regarded as conclusive, *Consum. Prod. Safety Comm. v. GTE Sylvania*, 447 U.S. 102, 108 (1980). The plain language of a statute expresses Congressional intent, *Ardestani v. INS*, 502 U.S. 129, 135 (1991). Indeed, the Court is bound to take Congress at its word, *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838, 841 (1998). Quite simply, if Congress meant to use the term "Aided and Abetted" it would not have used the term "Acting in Concert" when creating *18 U.S.C. 225*.

2. JUDGE REFUSED TO DEFINE "ACTING IN CONCERT"

Prior to instructing the jury, on July 20, 1995, the Trial Judge refused a defense request to define the term "Acting in Concert" for the jury (Appendix "D", page 31). Later the same day, the jury was given an undefined "Acting in Concert" instruction (Appendix "D", page 36). Therefore, the jury was given both an incorrect instruction, ("Aiding and Abetting" rather than "Acting in Concert") and the undefined "Acting in Concert" instruction. Rather than telling the jury to disregard the earlier incorrect "Aiding and Abetting" instruction, the Trial Judge told the jury that it was bound by both the instructions given at the beginning of the trial and those given at the end of the trial (Appendix "D", page 32). The Trial Judge stated that he would let the jury:

> **"use their understanding of what "In Concert" means"** (Appendix "D", page 32).

The Third Circuit has held that when Preliminary Instructions are given that the jurors must not be allowed to guess as to which of two conflicting instructions control their

deliberations, *U.S. v. Hernandez*, 176 F.3d 719, 731-735 (3d Cir. 1999). The Eighth Circuit has held exactly the opposite by it's affirmance in Lefkowitz I and II.

3. AIDING AND ABETTING IS A "LEGALLY IMPERMISSIBLE" THEORY

Since the jurors were permitted to convict based upon a finding of "Aiding and Abetting" rather than "Acting in Concert", they were permitted to consider a "legally impermissible" theory of guilt. There is no way to know whether the jury chose the "legally permissible" or the "legally impermissible" theory. In these circumstances, Reversal is mandated, *Yates v. U.S.*, 354 U.S. 928 (1957). There is no reason to believe that the jurors own intelligence and expertise would save them from error, *Griffin v. U.S.*, 502 U.S. 46, 59 (1991).

Language that merely contradicts ("Aiding and Abetting" v. "Acting in Concert") and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity, *Francis v. Franklin*, 471 U. S. 307, 323 (1985). Here the Court cannot discount the possibility that the jury may have interpreted the instructions to permit a conviction on mere proof of "Aiding and Abetting" rather than "Acting in Concert", *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979), *Bachellar v. Maryland*, 397 U.S. 564, 571 (1970).

The Tenth Circuit, in *U.S. v. Anderson*, 189 F.3d 1201, 1207 (10th Cir, 1999) has distinguished "Conspiracy" from "Aiding and Abetting" by explaining that "Aiding and Abetting" does not require proof of an "Agreement" element.

This Court has ruled that Conspiracy is a separate and distinct concept from Aiding and Abetting, *Pereira v. U.S. 347* US 1, 10 - 11 (1954). The Eighth Circuit, has eviscerated the distinction between "Conspiracy" and "Aiding and Abetting" in this case by Affirming the CFCE Conviction on an instruction that permitted proof of the Acting in Concert element without proof of an "Agreement", by giving an improper "Aiding and Abetting" instruction.

4. JUDGE RULES THAT "ACTING IN CONCERT" DOES NOT HAVE "AGREEMENT" ELEMENT

In December 1995, the Trial Judge Denied a Rule 29 Motion for an Acquittal. The Rule 29 Motion was grounded on the Government's failure to prove the "Agreement" element of "Acting in Concert" as required by *18 U.S.C. 225*. The Trial Judge Denied the Rule 29 Motion by analogizing the "Acting in Concert" element of *18 U.S.C. 225* with the "Managerial" element of *18 U.S.C. 225* (Appendix "J", page 47). The Trial Judge then found that I had "Managed" three (3) or more people and therefore had "Acted in Concert" with them. The Trial Judge relied upon *U.S. v. Possick* 849 F.2d 232 (8th Cir. 1988), which found that in a *21 U.S.C. 848* drug kingpin case that management of persons in a drug enterprise would by necessity be proof that the people had "Acted in Concert". The Eighth Circuit used similar logic in Lefkowitz I (Appendix "A", page 16) when it equated the "Managerial" element with the "Acting in Concert" element.

The 4th, 6th, and 10th Circuits conflict with the 8th Circuit on this issue. In the 4th Circuit, proof that a person unwittingly advanced an illicit purpose, falls short of "Acting

in Concert", *U.S. v. Patrick*, 963 F.2d 1390, 1396 (4th Cir. 1991). In *U.S. v. Layne*, 192 F.3d 556, 569 (6th Cir. 1999), the court reversed a conspiracy conviction when the record lacked proof of an Agreement to violate the law. The 10th Circuit has held that innocent participation in criminal activity may not be counted as Acting in Concert, *U.S. v. Smith*, 24 F.3d 1230, 1234 (10th Cir. 1994). The 10th Circuit also holds that a legitimate business partnership or employer-employee relationship does not constitute sufficient proof of a conspiracy or acting in concert, *U.S. v. Migliaccio*, 34 F.3d 1517 (10th Cir, 1994).

As this Court made clear in Rutledge, "Mutual Agreement" must be proven as an element of "Acting in Concert". The proof of a "Managerial" relationship with subordinates does not mean that such persons had the requisite mens rea to form an Agreement. When subordinates do not have any knowing complicity, then the "Agreement" prong is not met.

If Congress only intended to criminalize "Management" of three (3) or more persons, then Congress would not have used the term "Acting in Concert" in drafting *18 U.S.C. 225*. Congress does not use superfluous words when it enacts a statute, *Platt v. Union Pacific R.R.*, 99 U.S. 48, 58-59 (1879), *Hohn v* U.S. 424 U.S. 236 (1998). The 8th Circuit opinions in Lefkowitz I and II interpret the word "Management" so expansively so as to effectively swallow the words "Acting in Concert". Certiorari would resolve this conflict and establish that both "Management" and "Acting in Concert" are separate elements which each must be proven in an *18 U.S.C. 225* prosecution.

5. NO PROOF OF "ACTING IN CONCERT" ELEMENT

The Government Immunized Witnesses testified that they did not believe that what they were doing was illegal. Without proof of an "Agreement" to violate the laws as to unvacated counts, the Government did not prove the "Acting in Concert" element. The jury was never instructed that it was required to find an "Agreement" to violate the laws.

In *Iannelli v. U.S.*, 420 U.S. 770 (1975), this Court rejected the notion that a Defendant could "Act in Concert" with "5 Innocent Dupes". By focusing on the "Management" element rather than the "Acting in Concert" element, the District Court and the Eighth Circuit permitted a conviction on a theory rejected by this Court in Iannelli. Simply stated, when my former employees testified under immunity that they did not know that what they were doing was illegal, then they could not have been "Acting in Concert", notwithstanding that I was their boss or manager.

In *Jeffers v. U.S.*, 432 U.S. 137 (1977), this Court stated that "Acting in Concert" in a Drug Kingpin context *(21 U.S.C. 848)* requires more than proof of "mere involvement".

In a Drug Enterprise prosecuted under *21 U.S.C. 848*, it is logical to assume that a person who knowingly advances the objectives of the Drug Enterprise would be "Acting in Concert". However, in a seemingly legitimate business (such as real estate or real estate development), a jury would need guidance to distinguish between "mere employment" and "Acting in Concert". Without an instruction as to the elements of "Acting in Concert", the jury was not given any

"bright line" and may have found guilt due to "mere employment" rather than for concerted criminal activity amounting to "Acting in Concert" which is the proscribed conduct in *18 U.S.C. 225*.

18 U.S.C. 225 has the most draconian penalties of any "White Collar Crime" - a mandatory minimum of ten (10) years to life imprisonment. Guidance from this Court is socially important to assure that the dragnet of the Financial Kingpin Law is not used to criminalize "mere employment" (by businesses or business persons) of three (3) or more persons where there happens to be three (3) or more Mail or Wire Frauds, but where there is no "Agreement" to violate the laws. If the government is going to use this new Financial Kingpin Law as part of its arsenal, then juries must be instructed on the elements of "Acting in Concert".

6. NO "ACTING IN CONCERT" ON UNVACATED COUNTS

In Lefkowitz I the Eighth Circuit reversed two Counts of conviction without consideration as to whether four (4) or more persons "Acted in Concert" with respect to an unvacated "Series of Violations". By focusing on the "Management" element of *18 U.S.C. 225*, rather than on the "Acting in Concert" element, the Eighth Circuit either: 1) did not properly apply the recently decided Rutledge case (Appendix "A", pages 16), or 2) the Eighth Circuit did not believe that Rutledge applies to prosecutions under *18 U.S.C. 225*, since Rutledge concerned a CCE under *21 U.S.C. 848*.

The Summary Disposition by the Eighth Circuit in Lefkowitz II gives no indication as to whether it considered

the issue as to whether four (4) or more persons "Acted in Concert" with respect to an Unvacated "Series of Violations".

7. CERTIORARI OR A GVR ORDER IS APPROPRIATE IN LIGHT OF RUTLEDGE

It is likely that the jury would have acquitted on the *18 U.S.C. 225* Count had they been instructed that the standard was "Acting in Concert" rather than "Aiding and Abetting". It is likely that the jury would have acquitted had they been instructed that in order to prove "Acting in Concert" that the Government was required to prove that there was an "Agreement" to violate the laws.

It is likely that the Eighth Circuit would Reverse on the *18 U.S.C. 225* Count if this case was Remanded for consideration in light of Rutledge. In addition, it is likely that the Eighth Circuit would Reverse on Remand due to the fact that it never considered whether there were four (4) persons "Acting in Concert" with respect to a "Series" of unvacated "Violations".

A Grant of Certiorari is appropriate to determine whether the Rutledge requirement of "Agreement" applies in prosecutions brought under *18 U.S.C. 225*. Alternatively, a GVR Order is appropriate so that the Eighth Circuit can reconsider its decision in light of Rutledge and in light of the Vacating of Counts 1 and 30 to assure that I was not convicted of an act that is not proscribed by *18 U.S.C. 225*.

APPEAL FROM AN AMENDED JUDGMENT IS A "CRITICAL STAGE"

A. COUNSEL APPOINTED AT TRIAL AND ON APPEAL IN LEFKOWITZ I

Counsel was appointed in this case at Trial and on Appeal in Lefkowitz I pursuant to the provisions of the Criminal Justice Act (CJA), *18 U.S.C. 3006(A)*, (Appendix "K", page 49) & (Appendix "L", page 50)). On Remand from the Eighth Circuit to the District Court in Lefkowitz I, the Public Defender entered an appearance without objection by the Trial Judge or the Government.

B. COUNSEL DENIED IN LEFKOWITZ II

Both the District Court and the Eighth Circuit Denied a request for the Appointment of CJA counsel on Appeal from the entry of the Amended Judgment in Lefkowitz II, (Appendix "M", page 51) & (Appendix "N", page 52). Neither order states the factual basis for the denial of counsel on Appeal.

C. SIXTH AMENDMENT RIGHT TO COUNSEL ON APPEAL

This Court has interpreted the Sixth Amendment to include a Constitutional right to counsel on Appeal as a matter of right for all indigent persons, *Douglas v. California*, 372 U.S. 353 (1963). The denial of counsel is not subject to "Harmless Error" analysis where the defendant is left "entirely" without the assistance of counsel at any "Critical Stage" of the proceedings, *Penson v. Ohio*, 488 U.S.

75, 88 (1988), *Holloway v. Arkansas*, 435 U.S. 475 (1978), *U.S. v. Wade*, 388 U.S. 218 (1967). The actual or constructive denial of the assistance of counsel at any "Critical Stage" is legally presumed to result in prejudice, *Strickland v. Washington*, 466 U.S. 668, 692 (1984), *U.S. v. Cronic*, 466 U.S. 648 (1984).

However, this Court has also held that this right to counsel applies only to Appeals taken as a "statutory right", often referred to as the "first appeal of right", *Gideon v. Wainwright* 372 U.S. 335 (1963). This Court did state in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), that the right to appointed counsel extends to the "first appeal of right" and "no further". This language has generally been used to foreclose appointed counsel on collateral attack under the Habeas Corpus statutes (*28 U.S.C. 2255, 2254, 2241, 1651*). However, no case has resolved whether the Sixth Amendment right to counsel on Appeal applies to Appeals from the entry of an Amended Judgment in a Criminal Case.

D. APPEAL HERE BOTH STATUTORY AND AN APPEAL OF RIGHT

The Appeal in the present case from the Amended Judgment was both a statutory right of Appeal and the "first appeal of right" from the entry of the Amended Judgment. This was not a "discretionary appeal", *Wainwright v. Torna*, 455 U.S. 586 (1982).

I have been totally deprived of counsel on this Appeal of right from the entry of the Amended Judgment in this case.

By providing for a statutory right to appeal from an

Amended Judgment, but not providing an attorney to represent me on Appeal, the Eighth Circuit has created a dilemma of Constitutional magnitude. Such a "Hobson's Choice" of being given a statutory right to an Appeal, but being denied an attorney on that Appeal, is a "dilemma of Constitutional magnitude", which is intolerable under the U.S. Constitution, *Simmons v. U.S.*, 390 U.S. 377 (1968).

E. STATUTORY RIGHT OF APPEAL AND APPEAL OF RIGHT IS A "CRITICAL STAGE"

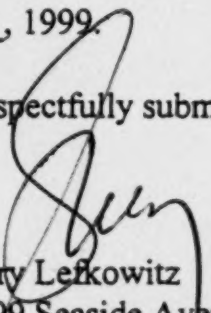
This Court should Grant Certiorari here to determine whether the Appeal from an Amended Judgment is a "Critical Stage" requiring the appointment of counsel. Alternatively, this Court should Grant a GVR Order so that the Eighth Circuit can make a finding whether I was denied an attorney at a "Critical Stage" of the proceedings.

CONCLUSION

For the foregoing reasons Petitioner Gary Lefkowitz respectfully prays that this Court grant the Writ of Certiorari or GVR this matter to the Eighth Circuit Court of Appeals.

Dated: December 31, 1999.

Respectfully submitted,



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Petitioner in Pro Se

APPENDIX

APPENDIX "A"
Published Decision in Lefkowitz I

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 97-4206 and 96-1228

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY LEFKOWITZ,

Defendant-Appellant.

Before RICHARD S. ARNOLD, Chief Judge, LOKEN, and HANSEN, Circuit Judges.

LOKEN, Circuit Judge.

Gary Lefkowitz, appeals his forty-five count conviction for mail and wire fraud, managing a continuing financial crimes enterprise, defrauding an agency of the

United States, aiding in the preparation of false tax returns, making false statements in a bankruptcy case, and obstruction of justice. He was sentenced to 293 months in prison for the continuing financial crimes enterprise and to lesser concurrent terms on the other counts of conviction. Lefkowitz argues that the evidence was insufficient to convict him of any crime, that a judge of this court denied him due process by limiting his Criminal Justice Act award for expert services to $169,000, and that the District Court (*FN1) abused its discretion in partially denying his third motion for a continuance. In No. 96-1228, Lefkowitz appeals a post conviction order that he reimburse the government for the costs of his defense. We reverse the convictions on one wire fraud count and one mail fraud count.

I. Sufficiency of the Evidence

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the government and uphold the verdict "if any interpretation of the evidence would allow a reasonable-minded jury to conclude guilt beyond a reasonable doubt." *United States v. Hood*, 51 F.3d 128, 129 (8th Cir. 1995).

A. The Core Scheme to Defraud.

From 1984 to 1994, Lefkowitz was the president of Citi-Equity Group, Inc. (CEG), a California corporation that formed real estate limited partnerships to build low-and moderate-income housing. In 1987, CEG began concentrating on projects that would qualify limited partners for low-income housing credits under 26 U.S.C. 42. To

qualify, investors must built, rehabilitate, or acquire buildings in which a prescribed percentage of the apartment units are occupied by low-income tenants. The federal government allocates tax credits to the States, with at least 10 percent reserved for ventures in which non profit organizations participate. State and local housing agencies allocate the credits to specific projects.

In a typical project, CEG would find land in a desirable location, develop plans for an apartment complex, hire a builder, and apply to the appropriate housing agency for tax credits. With credits allocated to the project, CEG would form a limited partnership, with Lefkowitz and CEG as general partners, and release a Private Placement Memorandum (PPM) to securities broker-dealers who market the investment to prospective limited partners. Money raised from limited partners was the project's equity, generally between one-quarter and one-third of the total project cost. Upon completion of the building, CEG's management company leased out the apartments, the state housing agency released the allocated tax credits, remaining debts to the builder were paid, and the limited partners began receiving their annual tax credits.

During the late 1980's, CEG's builders obtained construction loans to build the projects, while CEG obtained permanent financing to replace the construction loan once a building was completed. Beginning in 1990, with construction loans hard to obtain, CEG began marketing First Secured Mortgages (FSM's) to individual investors. FSM investors made non-recourse loans at construction loan interest rates to the limited partnerships that owned one or more designated projects, with the expectation that CEG's

permanent lender's would take out the FSM loans with long-term mortgages.

FRAUD ON INVESTORS.

When Lefkowitz left CEG in May of 1994, properties in which limited partners and FSM investors had invested more than $80,000,000 were unbuilt, unfinished, or lost in foreclosure. The evidence demonstrates that Lefkowitz had managed CEG so as to defraud investors. Funds from limited partners and FSM investors were first deposited in an operating account for each particular investment. But Lefkowitz and CEG as general partners immediately transferred all investors funds to a central CEG account. From there, Lefkowitz personally controlled all expenditures, and CEG employees had standing instructions first to pay Lefkowitz's personal bills, then CEG's general operating expenses, and finally expenses for the various ongoing projects. From January 1990 to May 1994, $9,500,000 was used to pay Lefkowitz's personal expenses, including over $5,000,000 in deposits into Mrs. Lefkowitz's bank account and $2,000,000 in American Express bills. CEG employees referred to the resulting shortfall- the difference between money on hand and money needed to replace project funds spent elsewhere-as the "black hole". In 1990, the black hole was $3,000,000 to $4,000,000. By January 1994, it had grown to $25,000,000 to $30,000,000. When CEG employees expressed concern about the growing black hole, Lefkowitz replied that he could always raise more money.

As the black hole grew, Lefkowitz increasingly relied upon funds from new projects to complete old projects. IRS agents traced new partnership deposits that cleared negative

balances in the central CEG account and then were used to meet Lefkowitz 's personal needs and to fund older projects. This practice was not disclosed to CEG investors, as each PPM included an "Estimated Use of Proceeds" section that showed only a small portion of the funds going to CEG for general parnter expense, salaries, and fees. Lefkowitz denies that this was fraudulent pointing to Article IX of the PPM', which permitted CEG to lend money "on behalf of the Partnership to others, including the General Partners and their Affiliates". However, while this provision would alert investors that idle limited partnership funds might be loaned to other productive projects, it did not describe Lefkowitz's practice of repeatedly "lending" limited partners' entire investment to projects whose funds were exhausted.

There was evidence Lefkowitz intentionally concealed these internal transfers from investors. Prior to one visit from a due diligence officer representing broker-dealers, Lefkowitz asked an in-house accountant if anything in the partnership tax returns might "hurt him". The accountant replied that pages reflecting the loans from the partnerships to CEG were his biggest concern. Lefkowitz promptly ripped those pages out of the tax return. On an other occasion, CEG's securities counsel asked Lefkowitz about his wholesale borrowing of investor funds. Lefkowitz replied that it was limited to short-term loans on a few occasions when partnerships had idle funds.

Lefkowitz also misused FSM funds. FSM loan documents provided that the borrowing partnership "shall not use or permit any related person" to use the FSM loans other than in connection with the construction and development of the property." Numerous investor witnesses described

meetings and conversations with Lefkowitz representing that monies raised in FSM offerings were construction funds that would be used to build specific projects, secured by mortgages on those projects, and that the money would be held in escrow and drawn down as construction proceeded. Notwithstanding these representations, FSM funds were transferred to the central CEG account and spent at Lefkowitz's discretion.

CEG's real estate construction projects could not be marketed to limited partners, FSM lender/investors, and builders without commitments for permanent financing from long-term lenders. Indeed by 1990, many housing agencies required proof of permanent financing before allocating tax credits to a proposed project. When CEG encountered difficulties in obtaining permanent financing, Lefkowitz persuaded the presidents of two lenders to provide commitment offers conditioned on CEG signing an acceptance and paying a fee within a specified period. Lefkowitz told the lenders that he would not use their letters, but he then referred to the letters in investor PPM's, sent them to housing agencies as part of CEG's applications for tax credits (in one case even providing a copy of a bogus check as evidence the commitment fee had been paid), and provided them to builders who used the letters to obtain construction loans. As a result of this deception, investors contributed money, housing agencies allocated tax credits, and builders built projects that CEG could not close.

FRAUD ON BUILDERS.

Because it commingled project funds, CEG sometimes failed to make progress payments to builders.,

When progress payments were in arrears on a particular project for which CEG did not disclose a lack of permanent financing, the result was devastating to the builder, who could not pay employees and subcontractors and could not undertake new projects because its capital was tied up in the CEG project. In these situation, Lefkowitz coerced builders to extend their construction loans and wait while CEG looked for permanent financing. If a builder became impatient, Lefkowitz threatened legal action, and in some cases fabricated claims and filed suit. In one such dispute, Lefkowitz testified that CEG was unable to obtain permanent financing because the lender "found severe construction defects, construction code violations and shoddy workmanship," when in fact the lender's inspection revealed only minor defects that would not have prevented permanent financing. These tactics forced several builders into bankruptcy.

FRAUD ON HOUSING AGENCIES AND THE IRS.

Lefkowitz's scheme included two different types of fraud on government agencies. First, CEG with Lefkowitz's personal approval represented to housing agencies that the National Development Council (NDC) was a nonprofit general partner in certain projects. In fact, NDC did not have a partnership agreement with CEG, and in many cases was unaware that CEG was using its name on tax credit applications. Based upon those misrepresentations, nonprofit tax credits were allocated to CEG projects and ultimately claimed by their investors.

Seeking to mollify investors when projects were late, Lefkowitz instructed CEG employees to file tax returns

claiming that buildings that had been finished late in the year had been completed and leased to tenants in January. This misrepresentation permitted CEG to wrongfully claim and distribute to investors tax credits for the entire year. There is ample evidence that Lefkowitz knew the properties were unfinished and the claimed credits were unearned. He once told a CEG accountant not to worry about claiming false completion dates because CEG had lots of property and Lefkowitz could always claim he was confused. In addition, on several occasions, Lefkowitz had CEG claim tax credits for periods during which CEG was negotiating to purchase low income housing projects built by others.

B. MAIL AND WIRE FRAUD

To sustain Lefkowitz's convictions on seventeen counts of mail fraud and thirteen counts of wire fraud in violation of sections 1341 and 1343, the evidence must establish a scheme to defraud, use of the mails or interstate wires incident to the scheme, and intent to cause harm. See *Periera v. Unites States*, 347 U.S. 1, 8, 74 S.Ct. 358, 362 98 L.Ed. 435 (1954); *United States v. Manzer*, 69 F.3d 222. 226 (8th Cir. 1995), *United States v. Nelson*, 988 F.2d. 798, 804 (8th Cir.), cert. denied, 510 U.S. 914, 114 S.Ct. 302, 126 L.Ed.2d 250 (1993). As we have explained, there was abundant evidence that Lefkowitz used CEG to implement a single massive scheme to defraud investors, lenders, builders, and governments. Thus, the issue for each of these counts is whether the government proved that a particular use of the mails or wires was "part of the execution of the fraudulent scheme." *Schmuck v. United States*, 489 U.S. 705, 712, 109 S.Ct. 1443, 1448, 103 L.Ed. 2d 734 (1989).

Counts nineteen, twenty-one and twenty-seven concern the Paris Place Apartments in Sauk Rapids, Minnesota. In the fall of 1991, construction was completed, CEG took possession, and tenants moved in. But CEG had only an illusory permanent financing commitment, so the partnership could not make the final payment to the builder. When the builder demanded payment, CEG sued the builder alleging failure to complete environmental studies. To support that claim, Lefkowitz persuaded the purported permanent lender to withdraw its commitment letter because of environmental problems and then submitted an affidavit stating that the lender refused to fund the loan and CEG had forfeited its commitment fee. The lender testified that CEG never paid the commitment fee and never requested that a permanent loan be funded.

Count nineteen is a letter from the builder to CEG demanding payment. Count twenty-one is CEG's reply, authorized by Lefkowitz after a months delay, directing the builder to come to Los Angeles to pick up its check. Count twenty-seven is the Lefkowitz affidavit. All were transmitted by wire. Lefkowitz argues the government failed to prove he intended to harm the builder in this contact dispute. However, the jury may properly infer intent from circumstantial evidence. See *United States v. Berndt*, 86 F.3d 803, 809 (8th Cir. 1996). The evidence was sufficient to permit a reasonable jury to infer that Lefkowitz intended to harm the builder by providing an illusory permanent financing commitment and then avoiding CEG's obligations to the builder with a sham lawsuit supported by Lefkowitz's false affidavit. Each document was either a use of the wires to further the scheme to defraud or, in the case of the builder's demand for payment, a reasonably foreseeable use

of the mails or wires by a third party. See *United States v. Brewer*, 807 F.2d 895, 898 (11th Cir.) Cert. Denied, 481 U.S.1023, 107 S.Ct. 909, 95 L.Ed.2d 515 (1987). The convictions on these counts must be affirmed.

Counts two, seven eight, and eighteen relate to Lefkowitz's on-going deception of investors. Count two is a Lefkowitz approved letter from CEG to an investor in the Citi-Minnesota partnership falsely stating that construction had been delayed by severe weather in Duluth but which would be completed on time. In fact, construction was never started. Counts seven and eight were identical letters to two investors in the Citi-Minneapolis IX partnership falsely stating that construction was "moving forward" and enclosing a photograph falsely described as depicting "a ground breaking ceremony...on the site of the property owed by Citi-Minneapolis IX". In fact, the Citi-Minneapolis IX project was never begun. Count eighteen was a wire transfer of Citi Elmcrest rental income into CEG's main account. That income had been dedicated to limited partners or to a reserve fund to cover unexpected maintenance costs.

Lefkowitz argues that the evidence was insufficient to convict him on these counts because the government failed to prove he embezzled investor funds. But the evidence was sufficient to prove that the three uses of the mails furthered the scheme to defraud by falsely assuring investors their projects were proceedings. See *United States v. Lane*, 474 U.S. 438, 451-52, 106 S.Ct. 725, 732-33, 88 L.Ed. 2d 814 (1986). The wire transfer of rental income was part of the core scheme to pool CEG project funds and use them without regard to contrary promises in the PPM's and partnership agreements.

Lefkowitz also argued that the government failed to prove use of the mails in counts seven and eight because the recipients testified that the letters arrived by mail but not by "United States mail." However, a rational jury may conclude from such testimony that the items were delivered by the United States Postal Service. See *United States v. Fox*, 69 F.3d 15, 18 (5th Cir. 1995), *United States v. Griffith*, 17 F.3d 865, 877 (6th Cir.), cert. Denied, 513 U.S. 850, 115 S.Ct. 149, 130 L.Ed.2d 89 (1994).

Counts nine and twenty-nine involve two letters concerning the existence of a permanent lender's prior dealings with CEG. Lefkowitz used the letters to induce investors to contribute to FSM-VIII, falsely representing the information contained in the lender's letter. He argues that the government failed to prove intent to deceive FSM-VIII investors because investors were on notice that CEG did not have solid permanent financing commitments. However, Lefkowitz used the letters to further his overall scheme to defraud investors by obtaining FSM funds that were siphoned away from the proposed projects to pay his personal expenses and CEG's other debts.

Counts fourteen to sixteen and twenty and twenty two to twenty-five relate to FSM-VI. The first three counts involve interest checks mailed to FSM investors at a time when FSM-VI's funds were depleted and could not be earning interest. These checks support a conviction for mail fraud because they prevented investors from uncovering the fraud. See Lane, 474 U.S. at 451, 106 S.Ct. 732. The last four counts involve wire transfers of the original investor funds into FSM-VI, unquestionably an integral part of the overall scheme to defraud as these funds were moved into

CEG's main account and spent on expenses unrelated to FSM-VI properties. Lefkowitz argues that pooling of investors funds and spending them at his discretion was not inconsistent with the language in the various PPM's. We disagree, but in any event the jury could reasonably find the overall scheme fraudulent, the language of the PPM's notwithstanding. The documents at issue in these counts clearly furthered that overall scheme.

Counts twenty-six and twenty-eight concern Lefkowitz approved letters that CEG faxed to one if its broker dealers. One letter falsely stated that CEG was holding FSM-IV funds in escrow and releasing them to contractors as work was completed when in fact CEG had already spent most of those funds on unrelated properties and was paying FSM-IV contractors from its main account. The other letter falsely stated that CEG had almost $1,500,000 of FSM-IV funds in a construction fund for the Aspen III apartment building; in fact, most FSM-IV funds had been funneled into CEG's main account and spent elsewhere. Lefkowitz argues this evidence does not prove intent to harm investors because the FSM-IV properties were built and he always intended to build Aspen III. Because both letters concealed CEG's use of the investor funds so that the broker-dealer would continue encouraging clients to invest in its projects. Intent to harm may be inferred from this type of active concealment. See *United States v. Stouffer*, 986 F.2d 923 (5th Cir.) cert. Denied, 510 U.S. 837, 114 S.Ct. 115, 126 L.Ed. 80 (1993).

Count thirty concerns a telephone conversation in early February 1993 between Lefkowitz and a Minnesota broker-dealer concerning whether the FSM-VI funds were

still in escrow and available for construction. Lefkowitz concedes that he lied about that but argues that the government presented no evidence that his was an interstate telephone conversation. The government responds, "There was no evidence that Lefkowitz, a California businessman, was in Minnesota at the time." Given the government's burden of proof, that response is totally inadequate.

Testifying for the government at trial, the broker-dealer related the substance of the conversation but not whether it was an interstate call. Lefkowitz testified at length for the defense but was not asked about this conversation. A jury may reasonably infer from circumstantial evidence that a telephone call was between the parties in different states. See *United States. V. Galbraith*, 20 F.3d 10534, 1056-57 (10th Cir.), cert . denied 513 U.S. 889, 115 S.Ct. 233, 130 L.Ed.2d 89 (1994). But our review of the massive record on appeal has uncovered no circumstantial evidence from which the jury could infer that Lefkowitz, who made many trips to Minnesota was elsewhere at the time of this call. Lacking help from the government on this issue, we agree with Lefkowitz that the evidence is insufficient to prove the interstate element of federal wire fraud. His conviction on count thirty must be reversed.

Counts three, four and seventeen related to tax credit applications. Two counts involve letters advising CEG that the Minnesota Housing Finance Agency (MHFA) had reserved nonprofit tax credits for projects after CEG falsely listed NDC as a fifty-percent general partner. Lefkowitz argues the evidence was insufficient to prove he knew of this misrepresentation. However, a CEG employee testified that Lefkowitz instructed him to claim NDC as a fifty-percent

partner and specifically approved the fraudulent applications.

The third count involves a fraudulent permanent financing commitment letter that CEG faxed to MHFA to satisfy its requirements for tax credits. Lefkowitz argues that no non-profit tax credit application was submitted for this project so the fax did not further an alleged scheme to defraud. However, for-profit tax credits were allocated to the project and claimed by CEG investors before the building was completed. Therefore, the fax was an integral step in the overall scheme to defraud the government of low-income housing tax credits (*FN2).

Counts five, six and ten to thirteen are IRS forms CEG mailed to investors advising they were entitled to claim low-income housing tax credits in a particular year. Five advised of non-profit tax credits for projects on which CEG had falsely claimed NDC as a partner. Lefkowitz argues he reasonably relied on his accountant to determine what credits investors could legitimately claim. However, Lefkowitz caused the filing of false tax credit applications. Advising investors to claim the resulting undeserved credits was a foreseeable and necessary step in its part of the overall scheme to defraud. The sixth tax form advised an investor to claim credits for all of 1990 on a project that CEG did not purchase until December 31, 1990. Lefkowitz argues insufficient proof of intent to defraud because CEG might have assumed the benefits and burdens of ownership, and thus became entitled to the credits, before signing the agreement. However, the real estate broker testified that he did not introduce Lefkowitz to the seller until late December, sufficient evidence that the claim of tax credits for the entire year was part of the overall scheme to defraud.

Count one involves a letter from Lefkowitz to a broker-dealer enclosing Lefkowitz's written response to a due diligence organizations's inquiry as to why he had not disclosed his suspension from the practice of law in California. Broker-dealers were concerned that the suspension should be disclosed to CEG investors. Lefkowitz's explanation was an dishonest summary of the conduct that caused the suspension and the California Supreme Court's opinion in the matter. At trial, Lefkowitz objected in chambers to any evidence of the California suspension as irrelevant and unfairly prejudicial. The government proposed to limit its evidence to a certified copy of the California Supreme Court opinion plus Lefkowitz's response to the broker-dealer inquiry, introduced with minimal foundation from a broker-dealer recipient. The district court ruled that the documents would be admitted on that basis. When the trial resumed, the witness testified that she received the letter and its enclosure but was not asked on direct or on cross exam if they were received by United States Mail. On appeal, Lefkowitz argues that the government failed to prove that the letter was sent by United States Mail (*FN#3). We agree that under the governing mail fraud statute [section 1341 has since been amended to include delivery "by private or commercial interstate carrier'], the governments proof as to the use of the mails was insufficient. See *United States v. Hannigan,* 27 F.3d 8900, 895,(3d cir. 1994); *United States v. Cady* , 567 F.2d 771, 775 (8th Cir. 1977). Accordingly, Lefkowitz's conviction on count one must be reversed.

C. Continuing Financial Crimes Enterprise (Count Forty-Seven).

The manager of a continuing financial crimes enterprise (CFCE) violates 18 U.S.C. 225 if he supervises a series of mail or wire fraud transactions which affect a financial institution, (ii) receives at least $5,000,m000 in gross receipts from the criminal enterpr4ise in a twenty four month period, and (iii) acts in concert with at least three other persons in executing the crime (*FN4). The jury found that Lefkowitz violated section 225 when CEG raised more than $5,000,000 from FSM-VI and FSM-VIII investors within a two-year period, because banks invested in those offerings and at least three other persons acted in concert with Lefkowitz in executing mail and wire fraud.

The evidence is clear that banks invested a total of $1,120,000 in FSM-VI and FSM-VIII. Those offerings together grossed over $5,000,000. Given CEG's practice of making all invested funds available to Lefkowitz personally, it is clear he received at least $5,000,000 from this part of the CEG enterprise in a two-year period. Lefkowitz suggest that banks investing in FSM-VIII were not "affected" because Lefkowitz used funds from later projects to repay FSM-VIII investors. However, whatever the banks finally realized on their investments, they were affected when deceived into investing funds that CEG then fraudulently misused.

Lefkowitz primarily argues that the government failed to prove he acted "in concert" with at least three other persons in defrauding financial institutions. "[T]he plain meaning of the phrase 'in concert' signifies mutual agreement in a common plan or enterprise". *Rutledge v. United States* 517 U.S. 860, 116 S.Ct. 1241, 1247, 1345 L.Ed.2sd 419 (1996). While acknowledging that numerous CEG employees acted in concert with him in executing the

overall scheme to defraud, Lefkowitz argues that there was no knowing complicity by his subordinates in the continuing FSM Fraud against Financial Institutions. The jury was carefully and properly instructed on this issue:

In order to sustain its burden of proof for the crime of managing a continuing financial crimes enterprise as charged in count 47 of the indictment, the government must prove the following:

One. The defendant committed three or more violations of the mail fraud and/or the wire fraud statutes affecting financial institutions

Four. The defendant organized managed or supervised these three or more other persons in connection with this series of valuations....;

(Emphasis added). We conclude that the evidence is sufficient to support the jury's finding that Lefkowitz violated 18 U.S.C. 225.

D. False Tax Returns (Counts Thirty-Two to Forty One)

Four of these counts concern low income tax credits CEG claimed for a project not yet completed. The other six related to credits based upon false placed into service dates. To sustain a conviction under 26 U.S.C. 7206(2), the evidence must show that defendant willfully caused the preparation of a materially false tax return. Lefkowitz first argues that the government failed to prove willfulness because he only mistakenly supplied incorrect information to

his accountants. However, the trial testimony of the various CEG accountants provided ample evidence that Lefkowitz (I) instructed a CEG accountant to claim credits on a project he knew was incomplete, and (ii) willfully provided false placed-in-service dates to his accountants. That is sufficient proof of willfulness. See *United States v. Kouba* 822 F.2d 768, 773 (8th Cir. 1987).

Lefkowitz also argues that false placed-into service dates will not sustain these convictions because low income housing tax credits also require proof that a building is a "qualified low-income building." *26 U.S.C. 42(f)(1).* Lefkowitz told his accountant that the projects were pre-leased to qualified low-income tenants, so that CEG could begin taking tax credits when the apartments were placed in service. Thus, Lefkowitz knew when he provided false placed-in-service dates that his accountant would wrongfully claim tax credits based on that information. That is sufficient to sustain the section *7202(2)* convictions.

E. False Statements in a Bankruptcy Case (Count Forty-Six)

CEG was forced into Chapter 11 bankruptcy shortly after Lefkowitz left the company in May of 1994. Some weeks later, after Lefkowitz attempted to sell a mortgage owned by a company he controlled but purchased with CEG investor funds, CEG filed in its bankruptcy case an affidavit by a real estate broker stating:

On approximately June 13, 1994, I received a telephone call from Mr. Lefkowitz. During that phone call Mr. Lefkowitz asked me if I would be interested in acting as

a broker to sell a mortgage which he holds on an apartment complex. I indicated to Mr. Lefkowitz that until the City Equity Group problems were resolved I would be unable to assist in this regard. Once I indicated that I was unable to assist him the phone call terminated rather abruptly.

Lefkowitz responded with an affidavit stating" "The conversation...never occurred". Based on Lefkowitz's affidavit, the jury convicted him of "knowingly making a false declaration, certificate, verification, or statement under penalty of perjury...in or in relation to any case under Title 11.". *18 U.S.C. 152(3).*

Lefkowitz argues that this conviction must be overturned because his statement was literally true. See *Bronston v. United States*, 409 U.S. 352, 362, 93 S.Ct. 595, 601, 34 L.Ed. 568 (1973). The broker's affidavit, Lefkowitz explains, gave the impression that Lefkowitz was attempting to sell his own mortgage, rather than one owned by a company he controlled. His affidavit, read literally, asserts that the conversation never occurred, not that it occurred but differently than the broker described it. Morever, this affidavit "must be considered in the context in which [it was] given." *United States v. Robbins*, 997 F.2d 390, 395 (8th Cir.), cert. denied, 5410 U.S. 948, 115 S.Ct. 391, 126 L.Ed. 2d 340 (1993). The jury could reasonably find that Lefkowitz lied to the bankruptcy court to cover up his effort to profit from the prior embezzlement of CEG property.

F. Obstruction of Justice (Count Forty-Four)

In early 1993, Lefkowitz received a letter informing him that he was the target of a grand jury investigation. In

October, he instructed a CEG employee to remove all documents relating to two projects from CEG's offices. The employee gathered two boxes of documents and took them to her home. When a government document subpoena in December included one of the projects, the employee did not produce responsive documents at her home with CEG's response. She finally produced the documents in early 1994 after receiving a target letter and discussing the matter with her own attorney. Based on this incident, Lefkowitz was convicted of violating *18 U.S.C. 1503* by corruptly obstructing the grand jury's investigation.

Lefkowitz argues that his conviction must be reversed because the government did not prove a sufficient nexus between his instruction to remove documents and an intent to impede the grand jury process. We disagree. Lefkowitz knew of the grand jury investigation when he instructed the employee to remove the documents. Based upon her testimony, the jury could reasonably infer that Lefkowitz had intended her to hide these documents from the government. He knew that CEG had raised money and claimed tax credits for these two projects when the partnerships did not own any property. Thus, whether the removed documents were in fact incriminating is irrelevant because the jury could reasonably find that Lefkowitz believed they would incriminate. Section 1503 is violated by "endeavors" to obstruct justice, which include "where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is foiled in some way", *United States v. Aguilar*, 515 U.S. 593, 600, 115 S.Ct. 2357, 2363, 132 L.Ed. 2d 520 (1995).

III. The Third Continuance.

On May 1, 1995 , after twice continuing the trial scheduled for August 1994, the district court granted Lefkowitz a continuance of three weeks, rather than the three months he requested. Lefkowitz argues that the court erred in not granting him a three-month continuance because his case was especially complex, the records were voluminous, and the denial to expert funding was an unforseen hardship. "We will not overturn a trial court's denial of a continuance unless the trial court clearly has abused its discretion, because continuance are not favored and should be granted only when a compelling reason has been shown." *United States v. Young,* 943 F.2d 24, 25 (8th Cir. 1991) (Quotations omitted), cert, denied 503 U.S. 964, 112 S.Ct. 1571, 18 L.Ed.2d 216 (1992). There was no abuse of discretion in this case. The district court specifically considered the case's complexity and its "unique circumstances" in granting the final three week continuance.

IV. The Recoupment Order.

Following his initial indictment, Lefkowitz requested appointed counsel under the CJA. See *18 U.S.C. 3006A.* A hearing was held at which Lefkowitz represented he had no assets or income because his wife owned their residences, cars, jewelry and art work. The court ordered Lefkowitz to submit, in camera, current financial statements for himself and his wife. After some delay, he submitted a financial statement showing a personal net worth of $18,600,000 on December 31, 1990. The court then concluded the he was able to pay his costs of defense and conditioned appointment of counsel on Lefkowitz or his wife depositing $250,000 with

the Clerk of the Court to cover those costs. When Lefkowitz reneged on his promise to deposit such assets, the court discharged his appointed counsel. Lefkowitz challenged this ruling, falsely representing that the court overseeing CEG's bankruptcy had enjoined him from depositing assets for his defense. Concerned that Lefkowitz be effectively represented in the criminal case despite his intransigence, the district court reappointed counsel, but reaffirmed that Lefkowitz was responsible for his costs of defense and ordered the Federal Defender to pursue collection if he did not comply with the court's order. Lefkowitz never deposited any funds with the court.

After conviction and prior to sentencing, the district court held a hearing to determine whether Lefkowitz should be ordered to pay his costs of defense. The government presented evidence that he had spent several hundred thousand dollars on personal expenses and unrelated attorney's fees between June 1994 and February 1995, contrary to his repeated claims of indigence. Lefkowitz admitted the expenditures but claimed that he had no significant assets and had been living off family loans for several months prior to his July 1995 incarceration. Unpersuaded, the district court concluded that Lefkowitz has funds available and ordered him to reimburse the government $316,693.70 for his costs of defense. Such an order is expressly authorized by *18 U.S.C. 3006A(f)*.

On appeal, Lefkowitz argues that the court's finding that he currently has funds available is clearly erroneous. We disagree. A defendant has the burden of demonstrating that he is unable to afford counsel, especially when a pretrial hearing casts doubt on his need for public assistance. See,

e.g. *United States v. Anderson*, 567 F.2d 839, 840 (8th Cir. 1977); *United States v. Harris*, 707 F.2d 653, 661 (2d cir.), cert. denied, 464 U.S. 997, 104 S.Ct. 495, 78 L.Ed. 688 (1983). Because Lefkowitz never met that burden, every pretrial order appointing counsel specified that he would ultimately bear the cost of his own defense. After the trial, Lefkowitz was given an opportunity to demonstrate that he is presently unable to reimburse the government for his defense. He presented nothing more than his personal testimony. The district court found that testimony entirely lacking in credibility, as do we. Our earlier orders granting him leave to prosecute these appeals in forma pampers are not to the contrary.

V. CONCLUSION

Lefkowitz's conviction on count one and count thirty are reversed, and the case is remanded for the entry of an amended judgment and for consideration of whether re-sentencing is necessary. The judgement in No. 95-4206 is in all other respects affirmed. The order appealed in No. 96-1228 is affirmed. The concerns which led us to file portions of the record in No. 96-1228 under seal appear to be no longer applicable. Therefore, unless Lefkowitz files a motion objecting to his action within the time allowed for a petition for rehearing, the Clerk is directed to make the entire record in No. 96-1228 a public record.

*FOOTNOTES

(*1) The Honorable David S. Doty, United States District Judge for the District of Minnesota.

(*2) Counts forty-two and forty-three charged Lefkowitz with violating *18 U.S.C. 1001* (1990) by knowingly and willfully using false documents in a matter within the jurisdiction of the United States (the IRS) when he caused CEG to file false non-profit tax credit applications with MHFA. Though Lefkowitz claims that he did not know the applications would list NDC as a project partner, there was ample evidence permitting a reasonable jury to find knowing and willful violations of section 1001. See *United States v. Yermian*, U.S. 63, 69, 104 S.Ct. 2936, 82 L.Ed. 53 (1984).

(*3) As to fifteen of the mail fraud counts, Lefkowitz generally argues that the government failed to prove use of the mails, and the government responds that there was testimony "for each mailing" but only provides three citations to the trial record. When the record is as massive as in this case, we expect defense counsel who raise an issue of this kind to cite the testimony of and exhibits establishing each failure of proof, and government counsel to respond with equal specificity. When both sides fail in this regard, appellant cannot complain if we affirm. However, in this case were have combed the record and found sufficient evidence as to use of the mails for all mail fraud counts with the exception of count one.

(*4) Section 225 provides:

(A) whoever (1) organizes, manages or supervises a continuing financial crimes enterprise; and (2) receives $5,000,0000 or more in gross receipts from such enterprise during any 24-month period, shall be fined not more than $10,000,000 if an individual, or $20,000,000 if an organization, and imprisoned for a term of not less than 10 years and which may be life.

(B) For purposed of subsection (a), the term "continuing financial crimes enterprise" means a series of violations under section 215, 656, 6457, 1005, 1007, 1014, 1032, or 1344 of this title, or section 1341 or 1343 affecting a financial institution, committed by at least 4 persons acting in concert.

(*5) The CJA provides a mechanism whereby "financially unable" defendants may obtain expert services "necessary for adequate representation." *18 U.S.C. 3006A(e)(1)*. Fees in excess of $1,000 must be certified by the district court and approved by an active circuit judge "as necessary to provide fair compensation for services of an unusual character or duration." *3006A(e)(3)*. In this case, the reviewing circuit court reduced the amount approved by the district judge.

APPENDIX "B"
Summary Disposition in Lefkowitz II

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 97-4248/4249

United States of America,

Appellee,

v.

Gary Lefkowitz,

Appellant.

Submitted: August 3, 1999
Filed: August 9, 1999

Before RICHARD S. ARNOLD, LOKEN, and HANSEN,
Circuit Judges

PER CURIAM

Gary Lefkowitz appeals from the district court's (*FN1) amended judgment following remand, and from the district court's order denying his motions for leave to appeal in forma pampers (IFP) and for appointment of counsel on appeal. He also seeks bail pending appeal, and has moved to recall the mandate in *United States v. Lefkowitz*, 125 F.3d 608, 612 (8th Cir. 1997), cert denied, 118 S.Ct. 1527 (1998), (*Lefkowitz I*).

In *Lefkowitz I*, we reversed two of Lefkowitz's forty-five criminal convictions and remanded to the district court "for entry of an amended judgment and for consideration of whether re-sentencing [was] necessary." See id. At 621. The district court amended the judgment and concluded re-sentencing was unnecessary. This district court also denied Lefkowitz's requests to proceed IFP, for appointment of counsel on appeal, and for bail pending appeal.

Having reviewed the record and the parties submissions on appeal, we agree that re-sentencing was not necessary, and we conclude that the district court did not err in denying Lefkowitz bail, leave to proceed IFP, and appointment of counsel on appeal. We also deny Lefkowitz's motions for bail and to recall the mandate in *Lefkowitz I.* Finally, we deny all of Lefkowitz' other pending motions, except for his motion to withdraw an issue on appeal which we grant.

Accordingly, we affirm the judgment of the district court. See *8th Cir. R. 47B.*

A True Copy.

Attest:

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX "C"
Government Brief - Lefkowitz II

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

CASES 97-4248/97-4249

United States of America,

Appellee,

v.

Gary Lefkowitz,

Appellant.

BRIEF OF THE GOVERNMENT

Page 10

Count 30 was one of nine counts related to FSM-VI and FSM VIII. Without count 30 at least eight counts remained that support the financial kingpin conviction...Counts 9 and 29 relate to letters that were provided to brokers and used to solicit investors in FSM VIII.

Page 11

Count 28 was a letter to a broker...relating to FSM-VI.

Page 12

...the United States did not prove that the Farmers State Bank was federally insured....

Page 15

Count 30 was one of a number of counts in the series

APPENDIX "D"
Final Jury Instructions - 7/20/95

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

United States of America,

Plaintiff,

vs.

Gary Lefkowitz,

Defendant.

VOLUME XXIV (Twenty Fourth Day)

TRANSCRIPT OF TRIAL

July 20, 1995

XXIV-2

Morning Session

(Open court, jury not present;)

THE COURT; Before we get under way, there are a couple of matters we have to deal with.

First you have all been given a redo of count forty five, and I understand you both agree to the redo except you have asked the court to submit some definition of in concert. We have done all kinds of research, we have looked in dictionaries, and we have decided that we are not going to define that within the instructions.

So therefore we are going to deny the motion to define that for the jury.

It is a common word. I suspect it was used by the drafters of that statute because it was more common than words such as "conspiracy" or "together with" and so forth.

So we are going to leave it at that and let the jury use their understanding of what in concert means.

July 20, 1995

XXIV-118

Afternoon Session

Now, all of the instructions that have been given by the court, those given to you at the beginning of the trial, those given to you during the trial and these final instructions, must guide and govern your deliberations.

XXIIV-157

In order to sustain its burden for the crime of mail fraud as charged in counts one through Sixteen of the indictment, the government must prove the following four essential elements beyond a reasonable doubt:

First.

The defendant voluntarily and intentionally devised a scheme to defraud developers investors and Internal Revenue Service of money and property, or to defraud them by obtaining money through the false representation set forth in the indictment;

Two.

The defendant did so with intent to defraud;

Three.

It was reasonably foreseeable to the defendant that the mails would be used;

Four.

The mails were used in furtherance of some essential step of the scheme.

You need to find that each person or institution was defrauded. But you must be unanimous as to one, in order to convict the defendant.

Counts Seventeen through Thirty of the indictment charge that defendant Gary Lefkowitz committed wire fraud

in violation of Title 18 Untied States Code, Section 1343.

XXIV-158

In order to sustain its burden of proof for the crime of wire fraud as charged in Counts Seventeen through Thirty of the indictment, the government must prove the following four essential elements beyond a reasonable doubt.

One.

The defendant voluntarily and intentionally devised a scheme to defraud developers, investors and the Internal Revenue Service, of money and property, or to defraud them by obtaining money through the false representations set forth in the indictment;

Two.

The defendant did so with the intent to defraud;

Three.

It was reasonably foreseeable to the defendant that the wires would be used; and

Four.

Interstate wires were used in furtherance of some essential step of the scheme

XXIV-164

In order to sustain its burden of proof for the crime of aiding in the preparation of false tax returns as charged in Counts Thirty Two through Forty One of the indictment, the government must prove the following:

One.

The defendant voluntarily and intentionally caused false K-1 forms to be sent to the taxpayers listed in the indictment for the tax returns listed in the indictment;

Two.

That the defendant knew that the K-1 forms were false; and

Three.

The taxpayers used the false K-1 forms in preparing and filing their federal income tax return.

XXIV-165

In order to sustain its burden of proof of making and using a false document as charged in Count Forty Two and Forty Three of the indictment, the government must prove the following four essential elements beyond a reasonable doubt:

One.

The defendant knowingly made and used a false document within the jurisdiction of the Internal Revenue Service;

Two.

At the time the defendant did so he knew that the document contained a false statement or entry;

Three.

The defendant did these acts knowingly, voluntarily and intentionally; and

Four.

The false statement or entry was material.

XXIV-170

In order to sustain its burden of proof for the crime of managing a continuing financial crimes enterprise as charged in Count Forty-Seven of the indictment, the government must prove the following:

One.

The defendant committed three or more violations of the mail fraud and / or wire fraud statutes affecting financial institutions;

Two.

The three violations were part of a series of violations committed by the defendant;

Three.

The defendant undertook to commit this series of violations in concert with three or more persons;

Four.

The defendant received five million dollars or more in gross receipts from this series of violations affection the financial institutions during the twenty-four month period from May, 1991 until May, 1993.

APPENDIX "E"
Trial Testimony of Attorney Richard Weintraub

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

United States of America,

Plaintiff,

v.

Gary Lefkowitz

VOLUME XIII

TRANSCRIPT OF TRIAL

June 28, 1995

****

TESTIMONY OF RICHARD WEINTRAUB

Page 113

Q: Okay. All right. At this time, of course, the

language doesn't say that the borrowings are on a short term basis. Correct?

A: Not the specific language of the partnership agreement.

Q: And they don't indicate that the borrowings are only of reserves of the limited partnership. Correct?

A: No, it doesn't say that either.

Q: Okay. And in fact it doesn't specifically say that the loans are limited to advances for fees or anything like that either. Correct?

A: No, it doesn't say that either.

Page 136:

Q: All right. So there was no separate entity known as an FSM after the first three partnerships. Correct?

A: No. The actual issuer was the underlying partnership that was borrowing the money from the individual investors.

APPENDIX "F"
Trial testimony of William Woodring, CPA

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

United States of America,

Plaintiff,

vs.

Gary Lefkowitz

VOLUME IV (DAY FOUR)

TRANSCRIPT OF TRIAL

June 113, 1995

Page 232

Q: Well, first of all, Mister Woodring, you were aware, were you not, that under the Private Placement Memoranda provisions and the conditions of the

agreements in the limited partnerships, that Citi Equity had the authority to borrow money from a partnership from time to time?

A: Gary had initially told us that. I checked the investor partnerships and found that to be true correct.

Page 238

Q: Your belief when you first came to work at Citi Equity was that, like the limited partnerships, it was permissible for Citi Equity and other entities to, to borrow money from the funds created by these First Secured Mortgages?

A: Yes, Gary had told us that was his, that he had the right to do that, so that is what I believed.

Q: Okay. And that was your belief and that was Mr. Lefkowitz's belief?

A: Yes, that was my belief.

Q: Okay. And you held that belief until late 1993 is that it?

A: I held that belief until 1994.

APPENDIX "G"
Trial testimony of Madeline Bernard

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

United States of America,

Plaintiff,

vs.

Gary Lefkowitz

VOLUME VIII

TRANSCRIPT OF TRIAL

June 27, 1995

TESTIMONY OF MADELINE BERNARD-EXCERPTS

Page 95

Q: Are you, do you recall reviewing the provisions of the private placement memorandum for the limited

partnership that refers to the right of the limited partnerships to borrow and lend money?

A: That was if, it is part of the disclosure document, then yes I would have.

Q: Let me draw your attention to a page marked A-7 of this PPM for Citi Minneapolis Nine. Under Article Nine, rights and obligations of the general partners. And I would like you to look at paragraph 9.02 sub-paragraph one--not -- I am sorry sub-paragraph five. Does that read:

To lend money or extend credit on behalf of the partnership to others including the general partners and their affiliates.

A: Yes.

Q: And that was part of the disclosure made to investors concerning Citi Minneapolis Partners Nine?

A: As in indicated there (indicating) yes.

APPENDIX "H"
Trial Testimony of John Lockery

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

United States of America,

Plaintiff,

vs.

Gary Lefkowitz.

VOLUME XII

TRANSCRIPT OF TRIAL

June 27, 1995

TESTIMONY OF JOHN LOCKERY-EXCERPTS

Page 155

Q: Okay. So the provisions of the private placement memorandum for the limited partnership then indicate

that the limited partnership can lend money to the general partner and borrow money from the general partner?

A: That is what that says.

Page 164:

Q: And if the limited partnership--which has borowed the money from the investors in the First Secured Mortgages has an obligation to pay interest to those investors in the First Secured Mortgage, it would be a benefit to those partners to have sources of income with which to pay that interest. Correct?

A:...so, you know, if you are asking me if that would be an acceptable use of that money, my understanding is that the acceptable use of the money was to build that building by making a loan, then I would say that was permissible, but he would have to do both under my understanding.

APPENDIX "I"
Preliminary Jury Instructions- 6/7/95

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARY LEFKOWITZ,

Defendant.

TRIAL TRANSCRIPTS

June 7, 1995

Page I-28

As for the last count, which is count 47, which is the crime of managing a continuing financial crimes enterprise, there are five special elements.

.....Three. The defendant Gary Lefkowitz, undertook

to commit this series of violations AIDED AND ABETTED by three or more persons.

APPENDIX "J"
Denial of Rule 29 Motion - 12/7/95

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Criminal No. 4-94-65

United States of America,

Plaintiff,

v.

Gary Lefkowitz,

Defendant.

ORDER

This matter is before the court on defendant's motion for judgment of acquittal pursuant to Federal Rule 29 (c) or alternatively, for a new trial pursuant to Federal Rule of Criminal Procedure 33. Based on the file, record and proceedings herein, and for the reasons stated below, defendant's motions are denied.

Page 11

Defendant also argues that the evidence is insufficient

because the government failed to identify three other individuals who acted "in concert" with the defendant and did not prove that he received $5,000,000 from a financial institution. The court rejects defendant's interpretation of the law. Defendant argues that "in concert" means acting pursuant to an illegal agreement. Judge Haight concluded that "in concert" and the management element is analogous to the requirement under the continuing criminal enterprise statute, 21 U.S. C. 848. The Eighth Circuit has held that the management element of section 848 of Title 21 is satisfied when a defendant exerts some type of influence over another individual as exemplified by that individual's compliance with the defendant's directions, instructions or terms." *United States v. Possick*, 849 F.2d 332, 336 (8th Cir. 1988)...A number of individuals reported directly to defendant and worked at his direction... thus the court finds sufficient evidence to support a finding that defendant committed a series of mail or wire frauds in concert with three other persons...

APPENDIX "K"
Order Appointing Counsel on Appeal - Lefkowirtz I

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Order Appointing Counsel

No. 95-4206 MNMI

United States of America,

Appellee,

v.

Gary Lefkowitz,

Appellant.

Because the above named appellant has testified under oath or has otherwise satisfied this Court that he or she: (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so requires:

IT IS ORDERED that the Federal Public Defender for the District of Minnesota is hereby appointed to represent (or to continue to represent) the above named appellant in all matters pertaining to this action before this court.

March 21, 1996

APPENDIX "L"

Order Confirming In Forma Pauperis Status- Lefkowitz I

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Order Appointing Counsel

No. 95-4206MNMI

United States of America,

Appellee,

v.

Gary Lefkowitz,

Appellant.

ORDER

March 21, 1996

Appellant Lefkowitz's in forma pauperis status is confirmed and Daniel Scott, Federal Public Defender is appointed to represent the appellant on appeal.

APPENDIX "M"
District Court Order denying appointment of counsel - Lefkowitz II

UNITED STATES DISTRICT COURT

FOURTH DIVISION

CRIMINAL No. 4-94-65

United States of America,

Plaintiff,

v.

Gary Lefkowitz,

Defendant.

"...defendants requests to proceed in forma pauperis and for appointment of counsel are denied for lack of basis in the record."

Dated: November 18, 1997

David S. Doty, U. S. Judge

APPENDIX "N"
Eighth Circuit Order denying appointment of counsel on Appeal - Lefkowitz II

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

CASES 97-4248/4249mn

United States of America,

Appellee,

v.

Gary Lefkowitz,

Appellant.

ORDER

This appeal, from the United States District Court for the District of Minnesota, comes before this Court on Appellant's motion for appointment of counsel and motion to proceed in forma pauperis on appeal.

These motions have been considered by the Court and are hereby denied.

March 11, 1998

Order entered at direction of the Court.

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court
F I

991224 FEB 1 - 2000

OFFICE OF THE CLERK

Case Number:

IN THE

Supreme Court of the United States

GARY LEFKOWITZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Supplement to Petition for Writ Of Certiorari

Gary Lefkowitz

1299 Seaside Avenue
P. O. Box 3007 06548-041
San Pedro, California 90731-0207

Petitioner in Pro Se

3 pp

Petitioner Gary Lefkowitz hereby requests that the Honorable Justices of the Court consider this Supplement to the pending Petition for Writ of Certiorari.

This supplement is necessary due to two cases that have been decided by the Court after the filing of my Certiorari Petition with the Court. Those cases are: ***Martinez v. Court of Appeal of California***, Case No. 98-7809 (January 12, 2000) and ***Smith v. Robbins*** Case No. 98-1037 (January 19, 2000)

In Martinez, the Court held that "...the Sixth Amendment does not apply to Appellate proceedings...", and suggested that the right to counsel on appeal flows from the Fifth Amendment Due Process Clause. In Smith, this Court states that "the precise rationale for the Griffin and Douglas line of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment and some from the Due Process Clause". It is clear from both of these decisions that the Court is grounding the right to counsel on appeal on the Due Process Clause of the Fifth Amendment rather than on the Sixth Amendment.

Unfortunately, I grounded the Fourth Question Presented to this Court on Sixth Amendment grounds rather than upon Fifth Amendment grounds. Accordingly, I hereby request that the Fourth Question Presented to the Court delete the words "Sixth Amendment". The question should now read:

IS AN APPEAL FROM AN AMENDED JUDGMENT A "CRITICAL STAGE" THAT TRIGGERS THE RIGHT TO COUNSEL.

Similarly, I request that the reference to the Sixth Amendments set forth on pages 1, 6, and 26 be stricken and that the word "Fifth Amendment" be considered in place and in stead.

Respectfully submitted,

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